UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

ENCOMPASS INSURANCE COMPANY OF MASSACHUSETTS,

Plaintiff,

vs.

JOSEPH D. GIAMPA, FREDERICK T. GIAMPA, ADVANCED SPINE CENTERS, INC., d/b/a FIRST SPINE REHAB, FUTURE MANAGEMENT CORPORATION, FUTURE MANAGEMENT BUSINESS TRUST, EDWARD KENNEDY, BRIAN J. CULLINEY, D.C. and JENNIFER McCONNELL, D.C.

Defendants.

Civil Action No. 1:05-cv-11693-RCL

<u>PLAINTIFF REQUESTS AN</u> <u>EXPEDITED HEARING</u>

PLAINTIFF'S OPPOSITION TO MOTION OF STPEHANIE VINAS TO QUASH THIRD-PARTY SUBPOENA AND MOTION TO COMPEL DEPOSITION OF STEPHANIE VINAS

NOW COMES the plaintiff, Encompass Insurance Company of Massachusetts (hereinafter "Encompass"), and hereby submits the within memorandum in opposition to the Motion of Stephanie Vinas to Quash Third-Party Subpoena. Encompass further submits the within memorandum in support of its Motion to Compel the Deposition of Stephanie Vinas. For all the reasons that follow, Encompass respectfully requests that this Honorable Court enter an Order:

- 1. **DENYING** Stephanie Vinas' Motion to Quash Third-Party Subpoena; and
- COMPELLING Stephanie Vinas to appear for deposition within ten (10) days of this Court's Order

I. INTRODUCTION

This case is brought pursuant to Title 18 U.S.C. §1962, Racketeer Influenced and Corrupt Organizations Act, Mass. Gen. Laws, ch. 93A, the Massachusetts Consumer Protection Act, and

Massachusetts common law of fraud and civil conspiracy. The defendants, acting in concert, participated in a concealed, evolving and continuous scheme and conspiracy to defraud Encompass.

The objective of defendants' fraud scheme was to illegally obtain money from the plaintiff through the submission of false medical records and bills (hereinafter "false medical documentation") in connection with alleged motor vehicle accidents. The defendants collected substantial sums of money as payment in connection with such false medical documentation referencing alleged chiropractic treatment that was never rendered and/or was unnecessary, excessive and unrelated to covered claims. The defendants successfully executed this scheme to defraud by creating and submitting such false medical documentation to Encompass and others by way of the U.S. Mail.

Encompass has pled and will prove at trial that the Future Management Corporation (hereinafter "FMC") employed an impermissible system of patient referrals in order to generate business at its various storefront medical facilities. Encompass alleges that FMC utilized "runners" to facilitate the recruitment of accident "victims" for treatment at the various FMC clinics. Encompass also alleges that Vinas was involved in the billing of treatment allegedly rendered by FMC clinics. In its Complaint, Encompass alleges that Stephanie Vinas (hereinafter "Vinas") was employed as a "runner" by defendants. See Plaintiff's Complaint at ¶ 70. Specifically, Encompass alleges that Vinas is a former patient of defendant, Brian Culliney, and was paid to recruit patients for defendants' Lowell First Spine clinic.

In its effort to develop relevant, admissible evidence regarding Vinas' role in defendants' patient referral system, Encompass noticed the deposition of Vinas. The deposition of Stephanie Vinas was noticed for April 25, 2007, at 10:00 a.m. at Smith & Brink, P.C. in Quincy,

Massachusetts. A copy of the Deposition Notice, Deposition Subpoena and Return of Service is annexed hereto at Exhibit A.

On April 9, 2007, Vinas, through counsel, filed a Motion to Quash Subpoena claiming that the Fifth Amendment and Article 12 of the Massachusetts Bill of Rights provides protection against compulsory self-incrimination. By her Motion, Vinas seeks to strike the deposition subpoenas and *avoid* Encompass' proper attempt at discovery.

II. STANDARD OF REVIEW

Fed. R. Civ. P. 45(d)(1) provides that a subpoena may command a person whose deposition is to be taken to produce materials which contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b). Fed. R. Civ. P. 26(b)(1) plainly provides:

> Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at trial if discovery appears reasonably calculated to lead to the discovery of admissible evidence.

Fed. R. Civ. P. 26(b)(1).

The sworn, oral testimony of Vinas is reasonably calculated to lead to the discovery of admissible evidence in the instant action. The instant litigation involves allegations of insurance fraud, specifically that defendants engaged in a pattern of over-utilization of treatment resulting in the submission, via the U.S. Mail, of excessive medical bills to Encompass. Included in plaintiff's Complaint are allegations that defendants employed an impermissible system of patient referrals, including the use of so-called "runners" to recruit patients for treatment at the

various FMC clinics. In discovery, Encompass has learned that Vinas was employed by FMC in its billing department.

Encompass maintains that the deposition testimony of Vinas will reveal relevant, material evidence regarding the allegations set forth in plaintiff's Complaint. The deposition testimony of defendants' own employee indicates that Vinas was employed at Future Management's corporate headquarters in Chelmsford, MA. See Deposition of Sokah Dy, Vol. II at p. 107, annexed hereto at Exhibit B. Encompass now seeks the deposition testimony of Vinas to obtain relevant, admissible evidence regarding (1) her role in the FMC patient referral scheme, and (2) her role in billing for FMC clinics.

III. MS. VINAS CANNOT AVOID DEPOSITION BY INVOKING THE PROTECTION OF THE FIFTH AMENDMENT AND/OR ARTICLE 12 OF THE MASSACHUSETTS BILL OF RIGHTS

In her Motion, Vinas argues that "[t]he overbroad third-party subpoena is merely a ruse by which Encompass seeks to force from Vinas' own lips the incriminating evidence Encompass needs to substantiate the baseless allegations made by Encompass against Vinas." Motion to Quash at p.5. Vinas relies on a number of criminal decisions construing the protections against self-incrimination provided by the Fifth Amendment and Article 12 of the Massachusetts Bill of Rights. Nowhere in her brief does Vinas cite any authority to support her assertion that a witness may invoke her Fifth Amendment rights to *avoid* a deposition in a civil case. Encompass avers that a witness may not refuse to appear at deposition by merely invoking the Fifth Amendment. Encompass maintains that Vinas, in a civil a matter, cannot properly invoke the Fifth Amendment until a question has been posed to the witness. See National Life Ins. Co. v.

¹ It is difficult to discern the legal basis for the instant motion. On one hand, Vinas claims that plaintiff's subpoena is improper because it seeks information regarding "baseless" allegation. However, in the same breath, Vinas infers that compliance with Encompass' subpoena would force her to disclose potentially incriminating evidence. Encompass requests that this Honorable Court disregard this untenable argument and compel Vinas to comply with the terms of this validly issued subpoena.

Hartford Accident and Indem. Co., 615 F.2d 595, 596 (3rd Cir. 1980) ("a witness in a civil proceeding may not invoke a blanket fifth amendment privilege prior to the propounding of questions...").

As a general matter, the proper procedure for invoking the right against self-incrimination in connection with a deposition is for the deponent to attend the deposition, be sworn under oath, and invoke the privilege as to those questions she cannot answer without running the risk of incrimination. See 8 WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE, § 2018, at 273-74. By appearing and asserting the privilege in response to specific questions, the court is able to ascertain whether those specific questions asked entitle the witness to claim the privilege. See Capitol Prods. Corp. v. Hernon, 457 F.2d 541 (8th Cir. 1972) (holding there is no blanket Fifth Amendment right to refuse to answer questions in noncriminal proceedings; "[t]he privilege must be specifically claimed on a particular question and the matter submitted to the court for its determination as to the validity of the claim."); Doe v. Glanzer, 232 F.3d 1258 (9th Cir. 2000) (noting in the context of a *civil deposition* the only way the privilege can be asserted "is on a question-by-question basis, and thus as to each question posed, the witness has to decide whether or not to raise the Fifth Amendment right."); De Antonio v. Solomon, 42 F.R.D. 320 (D. Mass. 1967).

Encompass has the right to call witnesses while expecting them to claim the Fifth Amendment privilege against self-incrimination. Numerous other jurisdictions permit parties to call witnesses knowing that they will invoke their Fifth Amendment privilege against self-incrimination. See FDIC v. Fidelity and Deposit Co., 45 F.3d 969, 977-979 (5th Cir. 1995) (refusing to adopt a rule barring a party from calling a non-party witness who had no special relationship for the purposes of having witness exercise his Fifth Amendment right); Cerro

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Gordo Charity v. Fireman's Fund Am. Life Ins. Co., 819 F.2d 1471, 1480 (8th Cir. 1987) (finding no error by allowing insurer to call a non-party witness (ex-director of the charity) for the sole purpose of having the jury hear him invoke the Fifth Amendment privilege); Brink's, Inc. v. The City of New York, 717 F.2d 700, 710 (2nd Cir. 1983) (ruling that the city could question past and present employees about their knowledge and participation in thefts and that their refusal to answer on Fifth Amendment grounds was competent and admissible evidence). The law in Massachusetts and numerous other jurisdictions supports Encompass' decision to call a non-party witness, even if that witness intends to invoke her Fifth Amendment privilege.

In Massachusetts, the invocation of the Fifth Amendment (and Article 12 under the Massachusetts Constitution) privilege by a non-party witness in the civil context may be used to draw an adverse inference against a party if a sufficient nexus between the witness and the party exists. See Lentz v. Metropolitan Prop. & Cas. Ins. Co., 437 Mass. 23, 26-28 (2002); see also Shafnacker v. Raymond James & Assoc., Inc., 425 Mass. 724 (1997) (citations omitted); Labor Relations Comm. v. Fall River Educators' Assoc., 382 Mass. 465, 471-2 (1981); Veranda Beach Club, Ltd. v. West Sur. Co., 936 F.2d 1364 (1st Cir. 1991)). This concept has been interpreted to permit an adverse inference against a corporation when its officers refuse to testify; and, in cases where an employee invokes the privilege, the adverse inference may be drawn against his or her employer. Shafnacker, 425 Mass. at 735-36 (citations omitted).

Vinas erroneously relies on criminal cases for the proposition that she can avoid Encompass' proper attempt at discovering relevant, material evidence regarding defendants' insurance fraud scheme by claiming that the entirety of her testimony is covered by her privilege against self-incrimination. Unlike criminal cases, "in a civil action, a reasonable inference adverse to a party may be drawn from the refusal of that party to testify on the grounds of self

incrimination." <u>Labor Relations Comm.</u>, 382 Mass. at 471. The liberty interests involved in a criminal case are greater than a party's interests in a civil case seeking monetary damages.

<u>Baxter v. Palmigiano</u>, 425 U.S. 308, 318-319 (1976).

In this case, Encompass alleges that Vinas was a voluntary participant in defendants' scheme to defraud Encompass. Vinas is a key witness with first hand knowledge of defendants' scheme. Encompass may be prevented from proving a portion of its affirmative allegations without the testimony of Vinas. Unlike prosecutors, Encompass is powerless to grant immunity to privilege invoking witnesses in order to compel their testimony. Therefore, unlike prosecutors, Encompass is powerless to overcome the severe disadvantage posed by the invocation.

In <u>Brink's</u>, <u>Inc. v. City of New York</u>, the Second Circuit Court of Appeals recognized the difficulty of establishing a bright line rule against drawing inferences from a non-party's refusal to testify in civil proceedings 717 F.2d at 708. "Congress manifested an affirmative intention not to freeze the law of privilege. Its purpose rather was to 'provide the courts with the flexibility to develop rules of privilege on a case-by-case basis,' . . . and to leave the door open to change."

<u>Trammel v. U.S.</u>, 445 U.S. 40, 47, 100 S. Ct. 906, 911 (1980) (citations omitted); <u>see also Data General Corp. v. Grumman Systems Support Corp.</u>, 825 F. Supp. 340 (D. Mass. 1993). Further, in <u>Aetna Cas. & Sur. Co. v. Rodco Autobody</u>, the Court permitted an adverse inference to be drawn against a defendant where a co-defendant invoked his Fifth Amendment privilege. 138 F.R.D. 328, 339 n.22 (D.Mass 1991).

Several other jurisdictions have held a non-party's invocation of the Fifth Amendment privilege may be used to draw an adverse inference against a party in a civil suit. <u>LiButti v. U.S.</u>, 107 F.3d 110 (2d Cir. 1997) (finding no error by instructing the jury that an inference may be

drawn against a party (sole proprietor of a business) where non-party witnesses who exercised financial and operational control over the business invoked privilege); FDIC v. Fidelity and Deposition Co., 45 F.3d 969 (5th Cir. 1995) (funding no error to permit jury to draw an adverse inference against party where non-party witnesses have collusive relationship (i.e. obtaining loans for bribes) with loan officers of the defendant); Cerro Gordo Charity v. Fireman's Fund American Fund Life Ins. Co., 819 F.2d 1471 (8th Cir. 1987) (finding no error to permit drawing of adverse inference against Charity where a former director who was not a party invoked privilege); RAD Services, Inc. v. Aetna Cas. & Sur. Co., 808 F.2d 271 (3rd Cir. 1986) (finding no reversible error where trial court permitted drawing of an adverse inference against a former employer were non-party former employees invoked privilege); Rosebud Sioux v. A&P Steel, Inc., 733 F.2d 509 (8th Cir. 1984) (holding that a non-party corporate officer's invocation of privilege may be used to draw adverse inference against corporation); Brinks, Inc. v. The City of New York, 717 F.2d 700 (2d Cir. 1983) (finding that adverse inferences may be drawn against corporation from non-party employee's claim of privilege); United States v. Dist. Council of New York City, 832 F.Supp. 644, 652 (S.D.N.Y. 1993) (holding where there is sufficient evidence of an employer/employee or co-conspirator relationship, a non-party's (i.e. local union officers or District Counsel officers) privilege invocation may be used to draw adverse inferences against a party in a civil case); E.H. Boerth Co. v. L.A.D. Properties, 882 F.R.D. 635 (D. Minn. 1979).

In this case, Encompass seeks to establish that Vinas was closely aligned with defendants in the execution of their insurance fraud scheme. Vinas has not provided any authority to support her position that she be permitted to *avoid* Encompass' discovery attempts by simply manifesting her intent to invoke her right against self-incrimination. It is well settled that a

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deponent, pursuant to a valid subpoena, must appear and assert her privilege to specific questions. As such, Encompass respectfully requests that this Court compel Vinas' compliance with the instant subpoena.

IV. CONCLUSION

WHEREFORE, for all the foregoing reasons, plaintiff, Encompass Insurance Company, respectfully requests that this Court enter an Order:

- 1. **DENYING** Stephanie Vinas' Motion to Quash Third-Party Subpoena; and
- 2. **COMPELLING** Stephanie Vinas to appear for deposition within ten (10) days of this Court's Order.

Respectfully submitted, Encompass Insurance Company, By its attorneys,

/s/ Nathan A. Tilden

Richard D. King, Jr., BBO#638142 Nathan A. Tilden, BBO#647076 Michael W. Whitcher, BBO#663451 SMITH & BRINK, P.C. 122 Quincy Shore Drive Quincy, Massachusetts 02171 (617) 770-2214

Dated: April 12, 2007

Certificate of Service

I, Nathan A. Tilden, hereby certify that on this 12th day of April, 2007, this documen
was filed through the CM/ECF and will be sent electronically to the registered participants as
identified on the Notice of Electronic Filing.

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

ENCOMPASS INSURANCE COMPANY OF MASSACHUSETTS,

Plaintiff-Counterclaim Defendant,

CIVIL ACTION NO.: 05-11693 RCL

vs.

JOSEPH D. GIAMPA, FREDERICK T. GIAMPA, ADVANCED SPINE CENTERS, INC. d/b/a FIRST SPINE & REHAB, FUTURE MANAGEMENT CORPORATION, FUTURE MANAGEMENT BUSINESS TRUST, EDWARD KENNEDY, BRIAN J. CULLINEY, D.C. and JENNIFER McCONNELL, D.C.

Defendants-Counterclaim Plaintiffs.

NOTICE OF TAKING DEPOSITION

To:

Thomas M. Ciampa Ciampa & Associates 20 Park Plaza, Suite 804 Boston, MA 02108 Jeffrey J. Phillips Daniel Treger Phillips & Angley One Bowdoin Square Boston, MA 02114 Matthew J. Conroy Belesi, Donovan & Conroy, P.C. Suite 400 1225 Franklin Ave. Garden City, NY 11530

Katherine L. Kurtz Belesi, Donovan & Conroy, P.C. 114 Waltham Street, Suite 25 Lexington, MA 02420 Jay B. Kesten Seyfarth Shaw LLP Two Seaport Lane Suite 300 Boston, MA 02210

Please take notice that at 10:00 am on Wednesday, April 25, 2007, at the offices of Smith & Brink, P.C., 122 Quincy Shore Drive, Quincy, Massachusetts 02171, the plaintiff, Encompass Insurance Company, by its attorneys, will take the deposition upon oral examination of the witness, Stephanie Vinas, 35 Bancroft Street, Dracut, MA 01826, pursuant to the applicable provisions of the Federal Rules of Civil Procedure, before a Notary Public or before some other officer authorized by law to administer oaths.

The oral examination will continue from day to day until completed. You are involved to attend and cross-examine.

The Plaintiff,

Encompass Insurance Company,

By its Attorneys

Richard D. King, Jr. (BBO #638142) Nathan A. Tilden (BBO #647076)

SMITH & BRINK, P.C. 122 Quincy Shore Drive Quincy, MA 02171

(617) 770-2214

Dated: March 19, 2007

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

ENCOMPASS INSURANCE COMPANY OF MASSACHUSETTS,

Plaintiff-Counterclaim Defendant,

CIVIL ACTION NO.: 05-11693 RCL

VS

JOSEPH D. GIAMPA, FREDERICK T. GIAMPA, ADVANCED SPINE CENTERS, INC. d/b/a FIRST SPINE & REHAB, FUTURE MANAGEMENT CORPORATION, FUTURE MANAGEMENT BUSINESS TRUST, EDWARD KENNEDY, BRIAN J. CULLINEY, D.C. and JENNIFER McCONNELL, D.C.

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The oral examination will continue from day to day until completed. You are involved to attend and cross-examine.

The Plaintiff,

Encompass Insurance Company,

By its Attorneys,

Richard D. King, Jr. (BBO #638142) Nathan A. Tilden (BBO #647076) SMITH & BRINK, P.C. 122 Quincy Shore Drive Quincy, MA 02171

(617) 770-2214

Dated: March 19, 2007

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

ENCOMPASS INSURANCE COMPANY OF MASSACHUSETTS,

Plaintiff-Counterclaim Defendant,

CIVIL ACTION NO.: 05-11693 RCL

vs.

JOSEPH D. GIAMPA, FREDERICK T. GIAMPA, ADVANCED SPINE CENTERS, INC. d/b/a FIRST SPINE & REHAB, FUTURE MANAGEMENT CORPORATION, FUTURE MANAGEMENT BUSINESS TRUST, EDWARD KENNEDY, BRIAN J. CULLINEY, D.C. and JENNIFER McCONNELL, D.C.

Defendants-Counterclaim Plaintiffs.

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The oral examination will continue from day to day until completed. You are involved to attend and cross-examine.

Encompass Insurance Company,

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Richard D. King, Jr. (BBO #638142) Nathan A. Tilden (BBO #647076) SMITH & BRINK, P.C. 122 Quincy Shore Drive Quincy, MA 02171 (617) 770-2214

Dated: March 19, 2007

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AOSA (Rev. 12/06) Subposes in a Civil Coas	Issued by the	910
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PLACE OF DEPOSITION Smith & Brink, P.C., 122 Quincy Shor	wedness Drive, Quincy, MA 02171	AND TIME esday, April 25, 200 0:00 AM
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I declare under penalty of perjury under the laws in the Proof of Service is true and correct.	of the United States of America that the foreg	going information contained
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Rule 45, Federal Rules of Civil Procedure, Subdivisions (c), (d), and (e), as amended on December 1, 2006:

(a) PROTECTION OF PERSONS SUBJECT TO SUBJUENAS.

(1) A party or an atterney responsible for the issuance and service of a subpoens shall take removable stope to avoid imposing undue burden or expense on a person subject to that subposine. The court on behalf of which the subposine was issued shall enforce this duty and supposts. The court on remain of winter the supposts was insteed about drawing any and impose upon the party or atterney in breach of this duty an appropriate aspection, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection, copying, testing, or

(2) (A) A person commanded to produce and perint depends, copying, testing of sampling of designated electronically stored information, books, papers, documents or tengible things, or inspection of premises need not appear in person at the piace of production or fragmention unless commanded to appear for deposition, hearing or wish.

inspection timess commanded to appear for deposition, nearing of crisi.

(B) Subject to paragraph (d)(2) of this rule, a parson commanded to produce and permit impection, copying, reading, or sampling may, within 14 and other service of the subpoone or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subports written objection to producing my or all of the designated namerials or inspection of the premises — or to producing cleanonically stored of the designated materials or inspection of the premises — or to producing clearronically stored information in the form or furthe requested. If objection is made, the party serving the subpoens shall not be childed to inspect, copy, test, or sample the materials or inspect the premises except pursuant to an order of the centry which the subpoens was Issued. If objection has been made, pursuant to an order of the centry which the subpoens was Issued. If objection has been made, the party serving the pubpoens may, upon notice to the person commanded to produce, move that may time for an order to compel the production, inspection, copying, testing, or sampling. Such an order to compel shall protect may person who is not a party or an officer of a party from significant expense resulting from the inspection, copying, testing, or sampling commanded.

(3) (A) On timely motion, the count by which a subpoens was issued shall quash or modify the subpoens if the

(i) fails to allow reasonable time for compliance;

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party of an officer of a party to inaval to a place more than 100 miles from the place where that person resides, is employed or regularly reasons business in person, except that, subject to the provisions of clause (oX3XB)(iii) of this rule, ruch person may in order to attend trial be commanded to travel from any such place within the enter to which the relationship. (III) requires disclosure of privileged or other protected metter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(В) И в виброния

(i) requires disclosure of a trade scorer or other confidential research, development,

or commercial information, of (ii) requires disclosure of an unrelained expents opinion or information not describing specific avants or occurrences in dispute and resulting from the expert's study made

(iii) requires a person who is not a party or an officer of a party to inour substantial expense to fravel more than 100 miles to attend trial, the court may, to protect a person subject

to or affected by the subposms, quasit or modify the subposms or, if the party in whose bohalf the subpoens is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the porson to whom the subposes is addressed will be researably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTISS IN RESPONDING TO SUBFORMA.

(1) (A) A perior responding to a subpoens to produce documents shall produce them as they are kept in the trausi course of business or shall organize and label them to correspond with the categories in the domand.

(B) If noubpoons does not specify the form or forms for producing alcottonically stored information, a person responding to a subpossia must produce the information in a form or forms in which the person ordinarily maintains is or in a form or forms that are reasonably

(C) A person responding to a subpoone used not produce the same electronically stored

information in more than one form.

Information in more than one form.

(D) A person responding to a subpoone need not provide discavery of electronically stored information from sources that the person identifies as not responsibly scenariole because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the count may nontheless order discovery from such sources if the requesting party shows good onuse, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

2(1)(A) Whom information subject to a subpoone is withheld on a claim that it is privileged or subject to protection as trial-precognision materials, the claim shall be made expressiv and

(2) (A) When information subject to a subpoce a withhald on a claim that it is privileged or subject to protection as trial-proparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to context the claim.

(B) If imbringing it produced in response to a subpoce that is subject to a claim of privilege or of protection as irial-proparation material, the porson making the claim may notify any party that received the information of the claim and the basis for it. After being notified, any party itser received the information of the claim and the basis for it. After being notified, a party must promptly feturn, sequester, or destroy the specified information and any capies it has end may not use or disclose the information until the claim is resolved. A receiving party has and may not use or disclose an intermetted which the users in every serious the information to the court under tool for a determination of the claim, may promptly present the information to the court under tool for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable traps to retrieve it. The person who produced the information that preserve the information until the claim is resolved.

(e) CONTEMPT. Reliure of any person without adequate execuse to obey a subpoons served upon thei person may be deemed a contempt of the court from which the subposes issued. An adequate cause for failure to obey exists when a subpoent purports to require a nonparty to strong or produce at a place not within the limits provided by clause (ii) of subparagraph (a)(3)(A).

MARCH 20, 2007

RETURN OF SERVICE

I this day summoned the within named STEPHANIE VINAS

to appear as within directed by delivering to (2) ATTEMPTS. COPY LEFT TAPED TO DOOR, SECOND COPY MAILED.

in hand

X leaving at last and usual place of abode, to wit:

No. 67 HAWTHORN STREET

in the LOWELL District of said MIDDLESEX County an attested copy of the subpoena together with \$58 fees for attendance and travel

Service and travel 28

Paid Witness 58

it being necessary I actually used a
motor vehicle in the distance of
miles in the service of

this process

Process Server

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	. Iss	ued by the	Δ_{a} .
	UNITED STATE	ES DISTRICT COUR'	T AND O TRUE
•		STRICT OF	O DISINES COPY
		achusetts	ERESTOCES
ncompass Insurance (assachusetts, V.	Company of	SUBPOENA IN	T AND OF TRUE COPY AND DISINES PROCESS A CIVIL CASE
Joseph D. Giampa, et	t. al.	Case Number:1	05-11693 RCL
TO: Stephanie Vina 35 Bancroft St Dragut, MA 018	reet 126 _.		
YOU ARE COMMANI testify in the above case	DED to appear in the United	States District court at the place,	date, and time specified below to
PLACE OF TESTIMONY			COURTROOM
FURGE OF TESTANDA			,
			DATE AND TIME
in the above case. PLACE OF DEPOSITION Smith & Brink, P.C.	, 122 Quincy Shore Dri	inspection and copying of the follo	DATE AND TIME Wednesday, April 25, 20 at 10:00 Am owing documents or objects at the
f ,			DATE AND TIME
			DELEGRACIONE
PLACE			ate and time specified below.
	IIIAlama	Seke following premises at the di	
	DED to permit inspection of	of the following premises at the de	DATE AND TIME
☐ YOU ARE COMMAN	NDED to permit inspection of	of the following premises at the d	DATE AND TIME
YOU ARE COMMAN PREMISES Any organization not a padirectors of managing agents methers on which the person v	arty to this suit that is subpoens s, or other persons who consen will testify. Pederal Rules of C	aed for the taking of a deposition sha t to testify on its behalf, and may set Civil Procedure, 30(b)(6).	Il designate one or more officers, forth, for each person designated, th
YOU ARE COMMAN PREMISES Any organization not a pa directors, of managing agents matters on which the person v ISSUING OFFICER'S SIGNATUR	arty to this suit that is subpoens, or other persons who consenwill testify. Pederal Rules of C	aed for the taking of a deposition sha	Il designate one or more officers, forth, for each person designated, the
Any organization not a padirectors of managing agents matters on which the person visualization of the person visu	arty to this suit that is subpoens s, or other persons who consen will testify. Pederal Rules of C	aed for the taking of a deposition sha t to testify on its behelf, and may set Civil Procedure, 30(b)(6). ORNEY FOR PLAINTIFF OR DEFENDANT	Il designate one or more officers, forth, for each person designated, th

If action is pending in district other than district of issuance, state district under case number.

and Automore in a Civil	I Case		
AO88 (Rev. 12/06) Submosma in a Civil			
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	DATE	PLACE	
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SERVED ON (PRINT NAME)			
		TITLE	
SERVED BY (PRINT NAME)		•	
	the state of the s	ARATION OF SERVER	
I declare under penalty of in the Proof of Service is true	perjury under the laws e and correct.	of the United States of America that the fo	oregoing information contained
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Executed on	DATÉ	SIGNATURE OF SERVER	
		ADDRESS OF SERVER	
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Rule 45, Federal Rules of Civil Procedure, Subdivisions (c), (d), and (e), as amended on December 1, 2006:

(c) Protection of Persons Subject to Subpoenae.

(c) PROTECTION OF PERSONS SUBJECT TO SUBPORNAE.

(1) A party or an atterney responsible for the issuance and service of a subposens shall take researched stops to svoid imposing undue barden or expense on a person subject to that subposes. The coun on behalf of which the subposes when javed shall enforce this duty and impose upon the party or aborney in breach of this duty an appropriate sanction, which may include, but is not limited to, but cardings and a reasonable attentey's fee.

(2) (A) A person commanded to produce and person temperation, copying, testing, or (2) (A) A person commanded to produce and person stops, papers, documents or tangible suppling of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection makes commanded to appear for deposition, hashing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and parmit

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit (a) ampiers to paragraph (a)(c) or the rule, a person commanded to produce and parmit inspection, copying, testing, or sampling may, within 14 days after service of the subpoces of before the time aspecified for compliance if such time is less than 14 days after service, serve before the time aspecified for compliance if such time is less than 14 days after service, serve upon the party or storage designated in the subpoces written objection to producing any or all upon the party or storage designated materials or inspection of the premitted—or to producing electronically storage of the designated materials or inspection of the premitted—or to producing electronically storage. of the designated materials or inspection of the premises—or to producing electronically stared information in the form or forms requested. If objection is made, the party serving the subpoons shall not be satisfied to inspect, copy, test, or sample the materials or inspect the pramises except shall not be satisfied to inspect, copy, test, or sample the materials or inspect the pramises except pursuant to an order of the cent by which the subpoune was issued. If objection has been inside, the party serving the subpoune may, upon notice to the person commanded to produce, move than y time for an order to compet the production, impection, copying, testing, or sampling starts any time for an order to compet shall protect any person who is nor a party or an officer of a party from Stock an order to compet shall protect any person who is nor a party or an officer of a party from Stock an order to compet shall protect any person who is nor a party or an officer of a party from Stock an order to compet shall protect any person who is not a party or an officer of a party from the inspection, dopying, testing, or sampling commanded, significant expenses resulting from the inspection, dopying, testing, or sampling commanded.

(3) (A) On timely motion, the court by which a subpound was issued shall quash or modify the subpounds of it.

che supposent it it.

(i) fails to ellow reasonable time for compliance;

(ii) fails to ellow reasonable time for compliance;

(ii) mequires a person who is not a party of an officer of a party to iravel to a place more than 100 miles from the place where there person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clauss (0)(3)(B)(iii) of this rule, such business in person may in order to attend trial be commanded to travel from any such place within the relation to the place. state in which the trial is held;

(iii) requires disclosure of privileged or other protected matter and no exception or

waiver applies; or

(iv) subjects a person to undue burden.

(i) requires disploying of a trade secret or other confidential research, development, (B) If a subposta

(ii) requires disclosure of an unrespined expense opinion or information not or commercial Information, or describing specific events or occurrences in dispute and resulting from the expert's study made

(iii) requires a person who is not a party or an officer of a party to insur substantial not at the request of any party, or expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subposes, quasit or modify the subposes or, if the party in whose behalf the subposes is issued shows a substantial need for the testimony or material that cannot be otherwise met without under hardship and assures that the person to whom the subposes is addressed will be reasonably compensated, the court may order appearance or production only anohibnee bolikoogs nogu

(d) Duties in Responding to Subforna,

(1) (A) A person responding to a subposes to produce documents thall produce (harn as they are kept in the usual vourse of business or shall organize and label them to correspond with the unlegaries in the demand.

(B) If a subpoons does not specify the form or forms for producing electronically stored information, a person responding to a subposine must produce the information in a form of forms in which the person ordinarily maintains it or in a form or forms that are reasonably

(C) A parson responding to a subpoons need not produce the same electronically stored

information in more than one form.

(D) A person responding to a subpoens need not provide discovery of electronically access information from sources that the person identifies as not reasonably accessible because of undue burden or east. On motion to compel discovery or to quest, the person from whem of undue burden or east. On motion to compel discovery or to quest, the person from whem discovery is cought must show that the information accepts is not reasonably accessible because of undue burden or cut. If that showing is made, the court may nonelleties order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2)(A) When information subject to a subpoens is withheld on a claim that it is privileged on subject to protection as trial-precuration materials, the claim shall be made expressly and

or subject to protection as trial-preparation materials, the slaim shell be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

not produced that is sufficient to enable the demanding party to convest the claim.

(B) If information is produced in respense to a subposens that is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, as party must promptly return, acquester, or destroy the specified in formation and any copies it has and may not use or disclose the information until the claim. Is resolved, A receiving party has and may not use or disclose the information until the claim.

If the receiving party disclosed the information before being partial is must be accounted. If the receiving party disclosed the information before being notified, it must leke reaconable if the receiving party disclosed the information must preserve the information steps to retrieve it. The person who produced the information must preserve the information until the claim is resolved.

(e) CONYEMPT. Failure of any person without adequate excuse to obey a subpoens served upon (e) LONTEMPT. Paints or any person without southers excuss to only a suppostance reveaupon that person may be deemed a contempt of the court from which the subposta issued. An adequate scale for fallure to obey exists when a subposta purports to require a nonparty to send or produce at a place not within the limits provided by clause (ii) of subparagraph. (a)(\$)(A).

MARCH 20, 2007

RETURN OF SERVICE

I this day summoned the within named STEPHANIE VINAS

to appear as within directed by delivering to SARAH VINAS, MOTHER, 11:55 AM

<u>X</u> in hand leaving at last and usual place of abode, to wit:

No. 35 BANCROFT STREET

in the DRACUT District of said MIDDLESEX County an attested copy of the subpoena together with \$58 fees for attendance and travel

Service and travel 28

Paid Witness 58

it being necessary I actually used a motor vehicle in the distance of 35 miles in the service of this process

Process Server

TRUE COPY ATTES AVIES: PROCESSE WIERES TO PERSO
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RCL
pecified below to
April 25, 200
cified below.
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¹ If sotion is pending in district other than district of issuance, state district under case number.

	AN AN AN AND TOUR
	PROOF OF SERVICE
DATE	PLACE
SERVED	
BERVED ON (PRINT NAME)	MANNER OF SERVICE
SERVED BY (PRINT NAME)	TITLE
	TOTAL PARTON OF SERVER
·	ECLARATION OF SERVER
I declare under penalty of perjury under the	aws of the United States of America that the foregoing information contains
I declare under penalty of perjury under the in the Proof of Service is true and correct.	aws of the United States of America that the foregoing information contains

Rule 45, Federal Rules of Civil Procedure, Subdivisions (c), (d), and (e), as smended on December 1, 2006;

(o) PROTECTION OF PERSONS SUBJECT TO SUSPOENAS.

(c) PROTECTION OF PERSONS BUBIECT TO SUSPORNAS.

(1) A party of an attorney responsible for the issuance and service of a subpoons shall take (1) A party of an attorney responsible for the issuance and service of a subpoons with a top of the subpoons was issued shall antitree this duty and subpoons upon the party of attenties in breach of this duty an appropriate sanction, which may include, but is not limited to, leat septings and a reasonable attenties? If the comments are commented to produce and respect to produce and respect to the contract to the comments are commented to produce and respect to a comment to the contract to t

include, but it not limited to, leat extaings and a reasonable enomey's fee.

(2) (A) A person commanded to produce and permit inspection, copying, testing, or sumpling addesignated decinorically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or misl.

(B) Subject to paragraph (dX2) of this rule, a person commanded to produce and parmit inspection, copying, testing, or sampling may, within 14 days after service of the subpoons or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or atomay designated in the subpoons written objection to producing any or all upon the party or atomay designated in the subpoons written objection to producing any or all information in the form or forms requested. If objection is made, the party serving the subpoons made, pursuant to an order of the court by which the subpoons was issued. If objection has been made, the party serving the subpoons may, upon actice to the person commanded to produce, move any time for an order to compel the production, haspection, copying, testing, or sampling at any time for an order to compel the production, haspection, copying, testing, or sampling such as order to compel shall protect any person who is not a party or an officer of a party from Such as order to compel shall protect any person who is not a party or an officer of a party from Such an order to compel shall protect any person who is not a party or an officer of a party from slight and a party or an officer of a party from slightly and a significant expense resulting from the inspection, copying, reating, or sampling commanded.

(3) (A) On timely motion, the court by which a subpoons was issued shall quash or modify

(i) fails to allow reasonable time for compliance;

a person may in order to attend trial be commanded to travel from any such place within the mate in which the trial is hold;

(iii) requires disclosure of privileged or other protested major and no exception or

weiver applies; or (iv) publicate a person to undue burden.

(B) If a subposes

(1) requires disclosure of a trade secret or other confidential research, development,

(ii) requires disciorure of an unretained expert's opinion or information not or commercial information, or describing specific events or occurrences in dispute and resulting from the expert's study made

(iii) requires a person who is not a party or an officer of a party to incur substantial not at the request of any party, or expense to travel more than 100 miles (o arrend trial, the court may, to protect a person subject

te or affected by the subposms, quash or modify the subposms or, if the party in whose behalf the subposits is issued shows a substantial need for the testimony or material that council be otherwise met without undue hardship and assures that the person to whom the subposts is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1) (A) A person responding to a subpoons to produce documents shall produce them as they are kept in the usual course of business or shall organize and lebel them to correspond with the categories in the demand.

(B) If a subposms doza not specify the form or forms for producing elestromically stored information, a person responding to a supposme must produce the information in a form of forms in which the person ordinarily maintains it or in a form or forms that are reasonably

(C) A person responding to a subposta need not produce the same electronically stored

Information in more than one form.

(D) A person responding to a subposes need not provide discovery of destronically stared information from sources that the person identifies as not reasonably escentible because of undue burden or occal. On moden to compel discovery or to quash, the person from whom of unque ourden or ocal. Lin monon to compet successfy or to queen, me person from whom discovery is sought must show that the information sought is not reasonably secrestial about the of undue burden or cost. If that showing is made, the court may nonetholess order discovery from such sources if the requesting party shows good name, considering the limitations of kule 26(b)(2)(C). The court may specify conditions for the discovery.

(2)(A) When information subject to a subpoens is withheld on a claim that it is privileged or subject to protection as irisi-preparation materials, the claim shall be analy measured and

(2) (A) When information subject to a subpoona is withheld on a claim that it is privileged, or subject to protection as irris-preparation materials, the cloim shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to coatest the claim.

(B) if information is produced in response to a subpoons that is subject to a claim of phyllege or of protection as prisi-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After boing notified, a party that transfer when the information of the claim and the basis for it. After boing notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or discloss the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. if the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The person who produced the information must preserve the information until the claim is resolved.

(e) CONTEMPT. Feilurs of any person without adequate excuse to obey a subposne served upon to) Continue; remains at any person without adoquete occurs to only a suppostationary at upon the person may be deemed a contempt of the court from which the subpostal issued. An adequate cause for failure to obey satisfy when a subpostal purports to require a nonparty to areas or produce at a place not within the limits provided by clause (ii) of subparagraph. (c)(3)(A)

MARCH 20, 2007

RETURN OF SERVICE

I this day summoned the within named STEPHANIE VINAS

to appear as within directed by delivering to (2) ATTEMPTS. COPY LEFT TAPED TO DOOR, SECOND COPY MAILED. ADDRESS CONFIRMED BY LAST NAME ON MAILBOX.

in hand

leaving at last and usual place of abode, to wit:

No. 84 LEYTE ROAD

in the FITCHBURG

District of said WORCESTER

County an attested

copy of the subpoena together with \$70

fees for attendance and travel

Service and travel

28

Paid Witness

70

it being necessary I actually used a motor vehicle in the distance of

miles in the service of 55

this process

Process Server

Pages: 1-131

Vol. II

Exhibits: 16

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

ENCOMPASS INSURANCE COMPANY OF MASSACHUSETTS, Plaintiff-Counterclaim Defendants, VS. JOSEPH D. GIAMPA, FREDERICK T. GIAMPA ADVANCED SPINE CENTERS, INC. d/b/a FIRST SPINE REHAB, FUTURE MANAGEMENT CORPORATION, FUTURE MANAGEMENT BUSINESS TRUST, EDWARD KENNEDY, BRIAN J. CULLINEY, D.C. and JENNIFER McCONNELL, D.C.)Civil Action Defendants-Counterclaim Plaintiffs.) No. 05-11693RCL JOSEPH D. GIAMPA, FREDERICK T. GIAMPA, ADVANCED SPINE CENTERS, INC. Third-Party Plaintiffs VS. ALLSTATE INSURANCE COMPANY, Third-Party Defendant

DEPOSITION OF SOKHA DY

A witness called by and on behalf of the Encompass Insurance Company, taken pursuant to the Massachusetts Rules of Civil Procedure, before Jo-Anne M. Golden, a Professional Court Reporter and Notary Public within and for the Commonwealth of Massachusetts, at the Law Offices of Smith & Brink, P.C., 122 Quincy Shore Drive, Quincy, Massachusetts 02171. Commencing on Thursday, March 28, 2007 at 10:26 a.m.

- 1 A. Right.
- Q. Can you get a referral -- can you get a bonus if
- you bring in a child patient? Is it the same as
- 4 an adult?
- 5 A. I don't know.
- 6 Q. Stephanie Vinas, who is that?
- 7 A. (No verbal response)
- 8 Q. Do you know that person Venas, Vinas?
- 9 A. Venas, Vinas?
- 10 Q. I'm just suggesting different pronunciations.
- 11 Stephanie is the first name. Last name, V-I-N-A-
- 12 S, do you know that person?
- 13 A. That's the girl that work at the medical building.
- 14 Q. Okay have you spoken to her before?
- 15 A. Yeah.
- 16 Q. How do you know she works there?
- 17 A. She a receptionist. I think a couple months.
- 18 Q. She's still there?
- 19 A. No.
- Q. When was the last time you were up there to the
- 21 medical building in Chelmsford?
- 22 A. I don't remember.
- 23 Q. You remember Kim Kong?
- 24 A. Yes.

CERTIFICATE

COMMONWEALTH OF MASSACHUSETTS

COUNTY OF NORFOLK, SS.

I, JO-ANNE GOLDEN, a Professional Court Reporter and Notary Public in and for the Commonwealth of Massachusetts, do hereby certify that the foregoing Deposition of SOKHA DY was taken before me on March 28, 2007. The said witness was duly sworn before the commencement of her testimony; that the said testimony was taken audiographically by myself and then transcribed under my direction. To the best of my knowledge, the within transcript is a complete, true and accurate record of said Deposition.

I am not connected by blood or marriage with any of the said parties, nor interested directly or indirectly in the matter in controversy.

In witness whereof, I have hereunto set my hand and Notary Seal this 4th day of April, 2007.

Jo-Anne M. Golden, Notary Public

My Commission Expires: December 6, 2007

PLEASE NOTE: THE FOREGOING CERTIFICATION OF THIS TRANSCRIPT DOES NOT APPLY TO ANY REPRODUCTION OF THE SAME BY ANY MEANS UNLESS UNDER THE DIRECT CONTROL AND OR DIRECTION OF THE CERTIFYING REPORTER.

JO-ANNE M. GOLDEN Notary Public My Commission Expires December 6, 2007